Supreme Court, U.S.
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No. 02-10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

GEORGE M. GALAZA, Warden, *Petitioner*,

v.

MICHAEL JEROME POWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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MOTION TO PROCEED IN FORMA PAUPERIS

Pursuant to Title 18, United States Code § 3006A(d)(7) and Rule 39 of this Court, Respondent Michael Jerome Powell asks leave to file the attached Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit without prepayment of fees and costs and to proceed *in forma pauperis*.

Respondent was represented by counsel pursuant to Title 18, United States Code, § 3006A(a)(2)(B), (d)(7) in the district court and on appeal to the Ninth Circuit Court of Appeals.

Dated: September 25, 2002

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Question Presented

Did the Court of Appeals correctly conclude that an improper jury instruction, which resolved the sole issue at Respondent's trial in favor of the prosecution, was the equivalent of a directed verdict and was therefore structural error?

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE CASE 4

REASONS FOR DENYING THE PETITION 12

I. The State Seeks an Opinion From This Court on an Alternative Holding That Does Not Disturb The Judgment Below 12

II. The Court of Appeals Followed This Court's Jurisprudence in Concluding That an Instruction That Effectively Directs a Verdict for the State Is Structural Error 14

III. No Circuit Split Exists Regarding Whether Instructions That Effectively Direct a Verdict for the State are Structural Error 18

IV. The Decision of the Court of Appeals is a Narrow Application of This Court's Jurisprudence 19

CONCLUSION 20

CERTIFICATE OF SERVICE BY MAIL

APPENDIX

TABLE OF AUTHORITIES

FEDERAL CASES

Caldwell v. Bell, 288 F.3d 838 (6th Cir. 2002) 18

Carella v. California, 491 U.S. 263 (1989) 2, 16, 17

Carpenters v. United States, 330 U.S. 395 (1947) 14, 17

Hegler v. Borg, 50 F.3d 1472 (9th Cir.), *cert. denied*, 516 U.S. 1029 (1995) 14

Moore v. Ponte, 186 F.3d 26 (1st Cir. 1999) 18

Neder v. United States, 527 U.S. 1 (1999) 15, 18

Peck v. United States, 106 F.3d 450 (2d Cir. 1997) 18

Powell v. Galaza, 282 F.3d 1089 (9th Cir. 2002) ..... passim

Quercia v. United States, 289 U.S. 466 (1933) 11, 12, 13

Rose v. Clark, 478 U.S. 570 (1986) ..... passim

Sandstrom v. Montana, 442 U.S. 510 (1979) 2, 16

Sullivan v. Louisiana, 508 U.S. 275 (1993) ..... passim

Teague v. Lane, 489 U.S. 288 (1989) 19

STATE CASES

People v. Forrester, 30 Cal. App. 4th 1697, 37 Cal. Rptr. 2d 19 (Cal.Ct.App. 1994) 15

STATE STATUTES

California Penal Code § 1320.5 ..... 5, 16

California Health & Safety Code § 11351.5 4

INTRODUCTION

Midway through Michael Powell's trial for failure to appear at a sentencing hearing, the trial court instructed the jury that Mr. Powell's testimony satisfied the only contested element at trial -- specific intent. By so instructing the jury on the only contested issue, the trial court effectively commanded a directed verdict for the state. Upon reviewing this Court's long-established case law, the Court of Appeals concluded that the instruction "went beyond the mandatory presumption instructions found unconstitutional in *Carella* and *Sandstrom*," by effectively directing a guilty verdict and, pursuant to *Sullivan v. Louisiana*, 508 U.S. 275 (1993), concluded that the instruction constituted structural error. *Powell v. Galaza*, 282 F.3d 1089, 1095-96 (9th Cir. 2002). The Court of Appeals also determined that even if the trial court's statement was a comment upon the evidence rather than an instruction, because the statement "went far beyond innocuous 'analysis' of the evidence," it was clearly erroneous. *Id.* at 1098.

In its petition for certiorari, the state limits its question presented to whether the Court of Appeals erred when it determined that the trial court's instruction constituted structural error. Because the Court of Appeals' reversal of the district court was based upon an alternative ground, a decision by this Court would not effect the judgment in this case. Therefore, certiorari is unwarranted.

As to the holding of the Court of Appeals of which Petitioner complains, Petitioner mischaracterizes this holding in its petition for writ of certiorari. Ignoring the Court of

Appeals' determination that the instruction was in effect a directed verdict and thus was structural error, Petitioner instead contends that the court concluded that the instructional error created merely a mandatory presumption as in *Carella v. California,* 491 U.S. 263 (1989) and *Sandstrom v. Montana*, 442 U.S. 510 (1979) and that the Court of Appeals then erroneously defined this as structural error pursuant to *Sullivan v. Louisiana*, 508 U.S. 275 (1993). Petitioner's argument is belied by the actual holding of the Court of Appeals. As the Court of Appeals found,

> [The trial court's] instruction *went beyond the mandatory presumption instructions* found unconstitutional in *Carella* and *Sandstrom.* The jury was not merely instructed to find specific intent to evade the process of the court once it found predicate facts. Rather, the court stated that Powell's testimony 'starts with an admission that he intended to evade the process of the court.' Any reasonable jurist easily could have understood this as an instruction that she or he was required to find the specific intent element satisfied . . . .
>
> Powell's conviction must be vacated because the court's midtrial instruction effectively directed the jury to find for the state on the specific intent element. Indeed, because specific intent was the only contested issue in the case, the trial court's instruction essentially directed a verdict of guilty and thus clearly violated the principles articulated in *Carella* and *Sandstrom*. Moreover, *Sullivan* commands that harmless error review is inapplicable.

Powell, 282 F.3d at 1095-96, 1099 (emphasis added).

Because the Court of Appeals' determination rests upon a proper application of this Court's precedent, the Court of Appeal's holding raises no critical or novel legal issues and certiorari is unwarranted.

Relying upon its mistaken view of the holding below, Petitioner also contends that

the decision of the Court of Appeals creates a circuit conflict and cites the holdings of three circuits applying harmless error analysis to mandatory presumption instructions and omitted instructions. In fact, no circuit conflict exists because this case does not involve either a mandatory presumption instruction or an omitted instruction. Because the Court of Appeals determined that the trial court's instruction had so impacted the jury as to be tantamount to a directed verdict, it defined the error as structural. There is no circuit case that reaches an opposite conclusion. Therefore, there is no circuit conflict warranting the grant of certiorari.

Finally, Petitioner contends that the Court of Appeals' opinion will subject "countless state and federal court judgments to unwarranted automatic reversal for instructional errors." The Court of Appeals' decision provides no basis for this concern. The Court of Appeals' decision was limited to an instruction whose impact on the jury was so great as to constitute a directed verdict. The decision was limited by the unusual facts of this case: the trial court, during the defendant's testimony, instructed the jury that the element of intent, the sole contested issue, had been met by Respondent's admission when, in fact, Respondent had denied that intent. The court then refused to allow Respondent's attorney to conduct redirect examination to correct the record. Finally, the court did not immediately remind the jury that it is the sole trier of the facts.

For the foregoing reasons, the petition for writ of certiorari should be denied.

STATEMENT OF THE CASE

Respondent Michael Jerome Powell was sentenced to serve a sentence of 29 years to life in prison for failing to appear at a sentencing hearing. At the time he failed to appear, Mr. Powell had pled guilty to possession of cocaine with intent to sell and was aware that he faced a maximum jail term of four years. Mr. Powell did not appear at his sentencing hearing because, as he later testified, although he was willing to serve his prison sentence he believed that, once incarcerated, he would be killed by members of a gang against whom he had recently testified.

In February, 1994, Mr. Powell had approached the San Francisco District Attorney's Office with information relating to the January 28, 1994 murder of a two-year-old girl. Mr. Powell told authorities, in a taped statement, that he had witnessed a fight between Emmanuel Davis, a Black Guerilla Family ("BGF") member, and an acquaintance of Mr. Powell's, a Mr. Holliman. Emmanuel Davis later attacked Mr. Holliman by shooting at the car in which Mr. Holliman and the two-year-old victim were riding. The child was killed.

Shortly after Mr. Powell spoke with the authorities about the child's murder, Mr. Powell was arrested in Marin County for possession of cocaine with intent to sell, in violation of California Health & Safety Code section 11351.5. In late November or December, 1994, while Mr. Powell was out on bail, he reluctantly testified at the murder trial. Although Mr. Powell feared retaliation, he elected to testify.

Mr. Powell pled guilty to the felony possession charge on November 23, 1994. He was scheduled to be sentenced on February 23, 1995, and had been told he faced a maximum sentence of four years. He failed to appear for sentencing. One year later, he was arrested on the outstanding warrant following a traffic violation and was charged with failing to appear, in violation of California Penal Code section 1320.5.

At the preliminary hearing on Mr. Powell's failure-to-appear charge, the court heard testimony regarding why Mr. Powell had not appeared to be sentenced. According to that testimony, soon after Mr. Powell testified against the BGF member, Mr. Powell began receiving numerous death threats on his pager. At one point, he received five pages on his pager, each immediately following the previous page. Mr. Powell's sister testified at the preliminary hearing that she had looked at the pager and each time the pager had read "187" -- the California Penal Code section for murder. Mr. Powell's sister testified that following the series of repeated pages, Mr. Powell looked very scared. He looked as though he was "afraid for his life." He did not tell his family where he was living. He told his father to move and told his sister not to visit their father because they "were in danger."

Mr. Powell's wife testified that he had also received a page from a number in the 415 area code. Mr. Powell called the number, listened, and then re-dialed and let his wife listen to the recording. The number belonged to a mortuary.

In January 1995, Mr. Powell and his wife were shot at by an unknown assailant.

Mr. Powell's wife testified that the unidentified man screamed "something about testifying" and then shot at her and Mr. Powell. A bullet entered the windshield and lodged in the dashboard. Neither Mr. Powell nor his wife was harmed.

While awaiting sentencing, Mr. Powell met with his probation officer and told him that he feared for his life and that of his family. Mr. Powell had also told the probation officer that he had been receiving death threats ever since he testified against the BGF member. At the preliminary hearing, the probation officer testified that Mr. Powell "talked at length about being threatened by gangs in the local area" and had told the probation officer that "he was very worried" and "expressed fears for his life in custody and in the community."

Prior to Mr. Powell's sentencing date, Mr. Powell's probation officer filed a memorandum of supplemental information on December 23, 1996. This memorandum consisted of a statement made by the San Francisco prosecutor, for whom Mr. Powell had testified, urging the court to exercise its discretion and strike one of Mr. Powell's prior convictions because "[t]he defendant should be given legitimate consideration for his cooperation in a very serious case. He was genuinely fearful throughout his testimony . . . The sentence of 25 years to life appears disproportionate to the spirit of the three strikes law."

In the Presentence Report filed regarding the drug offense, the probation officer had also documented a discussion he had with Mr. Powell's parole agent in which the

parole agent confirmed that Mr. Powell was in fear of his life and had told the probation officer that "defendant's return to the Department of Corrections could present life threatening problems."

Prior to Mr. Powell's trial on the failure to appear, the trial prosecutor sought to have all testimony regarding Mr. Powell's fear of retaliation excluded. Mr. Powell objected. He wanted to use this information as the basis of a necessity defense and to prove that he lacked the specific intent required to evade the process of the court. Defense counsel argued that if Mr. Powell's "state of mind was truly that he didn't mind doing four years in state prison and he was not trying to avoid [the court's process], that [evidence] would be a complete defense to the case." In response, the court ruled that Mr. Powell could not testify about his reason for failing to appear at the sentencing hearing. The court reasoned that because Mr. Powell was precluded from presenting a necessity defense, he should also be precluded from introducing evidence of his state of mind, as that evidence merely "boil[ed] down to a statement of necessity."

Nonetheless, during direct examination, Mr. Powell testified that he knew once he pled guilty that he would be sentenced to four years and that he was willing to serve that sentence. He further stated,

> The only thing I was really worried about was the BGF member that was going to kill me when I got to San Quentin. That was the only thing I was worried about. That's what we [Mr. Powell and his probation officer] discussed in full length.

The prosecutor immediately requested a hearing, due to a belief that Mr. Powell

had just violated the court's earlier ruling and to request that the statement be stricken. The court denied the request and permitted Mr. Powell to continue testifying.

When defense counsel asked Mr. Powell, whether in making the decision not to go to his sentencing, he was "trying to get away from anything that you thought the court was going to do to you," Mr. Powell said, "No." The court then interrupted defense counsel's direct examination and asked Mr. Powell, "You weren't trying to get away from getting sent to prison, which you knew was going to happen?" Mr. Powell responded that he had been shot at, and threatened, and was scared. The court restated its question, "[W]ere you or were you not trying to avoid the court's sentence?" to which Mr. Powell responded, "No, I was not."

The prosecutor subjected Mr. Powell to scathing cross-examination on this subject, filling 23 transcript pages. Following cross-examination, a recess was held and, outside the presence of the jury, the court admonished Mr. Powell and his defense counsel that they had violated its order regarding the necessity and specific intent defense.

The court observed, however, that the prosecutor had been able to remedy the situation:

> On the other hand, with further cross-examination and some latitude in doing so [regarding what] we've had so far, Mr. Jones [the prosecutor], I think you're handling it pretty well. And maybe in the process of hoisting them on their own Pitards [sic] I would contemplate the possibility of instructing the jury on necessity and on the issues of the question of intent at this junction so they don't go home with some misimpression of what's going on here.

Once the jury was brought back in, the court instructed the jury that the necessity defense was not available in this case and – in terms that are at issue here – further instructed the jury that Mr. Powell's testimony did not negate the specific intent element:

> And you cannot invoke the doctrine of necessity to excuse an illegal act in those circumstances. That defense is simply not available here in this case. And I've explained and re-explained it to the defendant and his attorney, and told them not to waste your time and the Court's time trying to inject it here.
>
> The other thing about it is, it doesn't relate in the slightest to the subject of intent. In fact, if you look carefully and logically at what has been said here about why the defendant didn't come to court, it doesn't vindicate or eliminate the intent to evade the court process. **In fact, it starts with an admission that he intended to evade the court process.**
>
> **So, it doesn't eliminate the mental element of this offense either. What he's saying by his repeated statements against my order is that he didn't come to court because he wanted to evade the process of the court, because he knew in all reason that he was going to be sent to prison. And that's what the element or the intentional element of this offense is about: Intent to evade the court process.**

(emphasis added).

The court also forbade Mr. Powell's attorney from revisiting the issue on redirect examination or presenting any additional evidence to rehabilitate Mr. Powell.

Four days later, at the end of the trial, the court further charged the jury:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or by any ruling I may have made to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion . . . .

> Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts.

The jury returned a verdict of guilty and on December 23, 1996, Mr. Powell was sentenced to 29 years to life in prison.

On direct review, the California Court of Appeal rejected Mr. Powell's claim that the mid-trial instruction was unfair and prejudicial. The court found, "Mr. Powell's evidence, including that which he was precluded from introducing, did not support a defense of necessity and did not negate the element of intent to evade the court process. It follows that no direct prejudice resulted from so informing the jury." The Court of Appeals denied Mr. Powell's petition for rehearing and the California Supreme Court denied review.

Mr. Powell filed a petition for federal writ of habeas corpus *in pro per* on May 18, 1999. On March 7, 2000, the district court granted Mr. Powell leave to file a Motion to Amend his Petition for Writ of Habeas Corpus. On April 7, 2000, Mr. Powell filed his Amended Petition.

The district court denied relief on December 13, 2000. *See* Respondent's Appendix A. On March 4, 2002, the Ninth Circuit Court of Appeals granted the writ in a published opinion.[1] *Id.*

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[1] Mr. Powell raised two other claims which the Court of Appeals declined to address in view of its favorable holding on the first claim: 1) whether the trial court

The Court of Appeals held that the trial court's statements were in effect a directed verdict and thus, pursuant to this Court's holdings in *Rose v. Clark*, 478 U.S. 570 (1986) and *Sullivan v. Louisiana*, 508 U.S. 275 (1993), were structural error. *Id.* Alternatively, the Court of Appeals determined that even if the trial court's statements were reviewed as comments upon the evidence rather than as an instruction to the jury, the statements "went far beyond innocuous 'analysis' of the evidence." *Powell*, 282 F.3d at 1098. Because the trial court did not immediately remind the jury that it alone was responsible for determining the facts, the Court of Appeals held that the trial court's statements were a clearly erroneous application of this Court's holding in *Quercia v. United States*, 289 U.S. 466 (1933).

The state petitioned for rehearing with a suggestion for rehearing *en banc*. The Court of Appeals denied the state's petition and suggestion on April 16, 2002. *Id.* On April 24, 2002, the Court of Appeals granted the state's request to stay issuance of the mandate pending the state's petition for certiorari. On May 7, 2002, the district court granted Mr. Powell's request for bail.

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violated Mr. Powell's Sixth Amendment right to present a defense by refusing to allow Mr. Powell to be rehabilitated on redirect examination; and 2) whether Mr. Powell's sentence of twenty-nine years to life for failing to appear constituted cruel and unusual punishment.

REASONS FOR DENYING THE PETITION

I. The State Seeks an Opinion From This Court on an Alternative Holding That Does Not Disturb The Judgment Below

At the urging of Petitioner, the Court of Appeals considered whether the trial court's statements were permissible "mere comment." *Powell*, 282 F.3d at 1097. The Court of Appeals determined that even if the trial court's statements were characterized as "mere comment upon the evidence" rather than as an instruction, the trial court's statements violated this Court's holding in *Quercia v. United States*, 289 U.S. 466 (1933). *Id.* at 1097.

In *Quercia*, the trial court, after having charged the jury, told the jury that the defendant had wiped his hands during his testimony and that, according to the trial court, "that is almost always an indication of lying . . . I think that almost every single word that man said, except when he agreed with the Government's testimony, was a lie." *Id.* at 468-69. The trial court followed this statement with a reminder to the jury that the trial court's opinion was not binding on the jury and that if the jury did not agree with it, it was the duty of the jury to find the defendant not guilty. *Id.*

This Court held that the trial judge's comments impermissibly added to the evidence and "put his own experience, with all the weight that could be attached to it, in the scale against the accused." *Id.* at 471. This Court also determined that the trial court did not cure the error through an immediate admonition that its opinion was not binding. "[The opinion was] of a sort most likely to remain firmly lodged in the memory of the

jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Id.* at 472.

Here, the Court of Appeals rejected Petitioner's argument that the trial court's statements constituted mere comment upon the evidence and found that, as in *Quercia*, "the trial court's comments went far beyond innocuous 'analysis' of the evidence." *Id.* at 1098. The court recognized that although, unlike *Quercia*, the trial court did not explicitly say that Mr. Powell was lying, the trial court's statements "were just as damaging." *Id.* Moreover, the court found that the trial court's statements followed Mr. Powell's denial of the intent to evade and that, despite this denial, the trial court characterized the testimony of Mr. Powell as "an admission of specific intent to do just that." *Id.* The Court of Appeals further found that "[t]he court failed to follow its opinion regarding Powell's testimony with an immediate reminder that the jury could disregard the court's opinion because the jury alone was responsible for determining the specific intent element." *Id.* Accordingly, the Court of Appeals found that the trial court's statements were clearly erroneous. *Id.*

Petitioner has not sought review in this Court of this alternate holding of the Court of Appeals. Rather, Petitioner asks this Court to address only whether the Court of Appeals' decision to treat the instruction as structural error was correct. Because the Court of Appeals decided the case on an alternative ground when it held that the trial court's statements were "clearly erroneous" under *Quercia*, any opinion of this Court on

the question presented in the petition would not effect the judgment below. Certiorari is unwarranted.

II. The Court of Appeals Followed This Court's Jurisprudence in Concluding That an Instruction That Effectively Directs a Verdict for the State Is Structural Error

This Court has long recognized that harmless-error analysis does not apply where a court has directed a verdict for the prosecution in a criminal trial by jury. "[A] trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (*quoting United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-573 (1977) (inner quotations and citations omitted)) *reaff'd. Neder v. United States*, 527 U.S. 1, 17 n.2 (1999). *Accord, Carpenters v. United States*, 330 U.S. 395, 408 (1947). Where the judge's instruction altogether denies a defendant his Sixth Amendment right to a jury trial, "the State cannot contend that the deprivation was harmless because the evidence established the defendant's guilt; the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578. Such an error is structural because the error is of sufficient consequence so that the criminal process "cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Rose*, 478 U.S. at 577-78. *See Hegler v. Borg*, 50 F.3d 1472, 1476 (9th Cir.), *cert. denied*, 516 U.S. 1029 (1995) (determination of whether an error is structural does not depend on the particular rule violated as much as it does on the error's effect on

the criminal process itself).

In *Sullivan v. Louisiana*, 508 U.S. 275 (1993), this Court addressed the issue of whether a constitutionally deficient reasonable doubt instruction is subject to harmless error review. The Court began its analysis with the premise that although most constitutional errors are subject to harmless error review, some errors "will always invalidate the conviction." *Id.* at 279. In determining that the error in *Sullivan* was not amenable to harmless error review, this Court reasoned that the entire basis of harmless error review was absent: "There being no jury verdict of guilty-beyond-a-reasonable-doubt, the question whether the same verdict of guilty-beyond-a-reasonable-doubt would have been rendered absent the constitutional error is utterly meaningless. There is no object, so to speak, upon which harmless error scrutiny can operate." *Id.* at 280.

The error in *Sullivan* vitiated all the jury's findings, and any determination by the reviewing court of what the jury would have done absent the error would be pure speculation. *Id.* This Court then admonished appellate courts that "speculation about a hypothetical jury's action" does not satisfy the Sixth Amendment's requirement that a verdict of guilty must rest on an actual jury finding of guilty "or else directed verdicts for the State would be sustainable on appeal." *Id. See also Neder*, 527 U.S. at 17 n.2 (reaffirming Court's determination in *Rose* that directed verdict is structural error).

Here, Petitioner was required to prove that Mr. Powell failed to appear with the specific intent to evade the process of the court. *See People v. Forrester*, 30 Cal. App.

4th 1697, 37 Cal.Rptr.2d 19 (Cal.Ct.App. 1994), *rev. denied*, (Cal. 1995).[2] Intent was the sole contested issue at trial. The trial court mischaracterized Mr. Powell's denial of intent to evade as an admission of that intent and instructed the jury that Mr. Powell, by virtue of this "admission," had satisfied the state's burden of proving willful failure to appear. The judge's instruction removed the sole contested issue from the jury, in effect, commanding a guilty verdict.

Examining the trial court's instruction in light of *Carella v. California*, 491 U.S. 263 (1989) and *Sandstrom v. Montana*, 442 U.S. 510 (1979), the Court of Appeals correctly determined that the instruction "*went beyond* the mandatory presumption instructions found unconstitutional in *Carella* and *Sandstrom*." *Powell v. Galaza*, 282 F.3d 1089, 1095-96 (9th Cir. 2002) (emphasis added). The Court of Appeals found:

> The jury was not merely instructed to find specific intent to evade the process of the court once it found certain predicate facts. Rather, the court stated that Powell's testimony 'starts with an admission that he intended to evade the process of the court.' Any reasonable jurist easily could have understood this as an instruction that she or he was required to find the specific intent element satisfied. Moreover, the court's later instructions were inadequate to undo the damage caused by the court's earlier definitive statement. The court's qualification that 'I have not intended by anything I have said or done . . . to intimate or suggest what you should find to be the facts' was too general and too late to ensure that the jurors would entirely disregard the court's instruction that the only contested issue in the case should be decided against Powell.

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[2] "Every person who is charged with the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony." CAL. PENAL CODE § 1320.5 (West 1996).

Id.

The Court of Appeals concluded that the record supported the following facts: 1) the trial court's mid-trial instruction that Respondent had admitted the requisite specific intent, despite the fact that Respondent had made no such admission, concerned the only contested element; 2) the court's instruction immediately followed Respondent's testimony; 3) defense counsel was not permitted to conduct redirect examination of Respondent on this issue; and 4) the trial court did not immediately remind the jury that the court's opinion was not evidence. *Id.* at 1093-96.

Based upon this combination of circumstances, the Court of Appeals held that harmless error review was inapplicable. The Court of Appeals acknowledged that "[the] Court in *Carella* explained that a mandatory presumption instruction can be reviewed for harmless error because it is not equivalent to a directed verdict for the state – the jury is still required to find the predicate facts underlying each element beyond a reasonable doubt." *Id.* at 1096 (*citing Carella*, 491 U.S. at 266 and *Rose*, 478 U.S. at 579-80). The Court of Appeals recognized, however, that the instruction here did not call for a mandatory presumption but was "effectively the same as a directed verdict for the state . . . ." *Id.* at 1096.

In reliance upon *Sullivan v. Louisiana*, 508 U.S. 275 (1993), *Rose v. Clark*, 478 U.S. 570 (1986) and *Carpenters v. United States*, 330 U.S. 395 (1947), the Court of Appeals correctly refused to review the instruction for harmless error because "'there has

been no jury verdict within the meaning of the Sixth Amendment.'" *Powell*, 282 F.3d at 1097 (*quoting Sullivan*, 508 U.S. at 280). The impact of the error was to effectively eliminate the jury's role in Respondent's criminal trial. Because the criminal process here "cannot reliably serve its function as a vehicle for determination of guilt or innocence," the Court of Appeals appropriately determined that the error was structural. *Rose*, 478 U.S. at 577-78.[3]

Because the Court of Appeals' decision adheres to well-established precedent of this Court, certiorari is unwarranted.

III. No Circuit Split Exists Regarding Whether Instructions That Effectively Direct a Verdict for the State are Structural Error

Petitioner's contention that a circuit conflict exists cannot provide a basis for a grant of certiorari because Petitioner's argument rests upon the aforementioned mischaracterization of the Court of Appeals' holding. *See* Petitioner's Brief at 10 citing *Caldwell v. Bell*, 288 F.3d 838 (6th Cir. 2002) (applying harmless error review to erroneous mandatory presumption instruction); *Moore v. Ponte*, 186 F.3d 26 (1st Cir. 1999) (same); *Peck v. United States*, 106 F.3d 450 (2d Cir. 1997) (applying harmless

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[3] Petitioner's reliance on *Neder v. United States*, 527 U.S. 1 (1999), is unavailing. The Court of Appeals did not find, as in *Neder*, that the trial court had erroneously omitted one element of many in its instructions to the jury. Rather, the Court of Appeals found that the trial court's instruction, erroneously characterizing Respondent's denial as an admission regarding the sole contested element, effectively eliminated the jury's role and thus was tantamount to a directed verdict for the state. *See Powell*, 282 F.3d at 1098-99.

error review to erroneous omission of instruction).[4] The circuit court cases cited by Petitioner address mandatory presumption and omitted element instructions. There is no conflict among the circuits on the issue before this Court – whether jury instructions that effectively direct a verdict for the state are structural error. The law is well-established that such instructions are not subject to harmless error review, and Petitioner has not cited circuit authority to the contrary.

IV. The Decision of the Court of Appeals is a Narrow Application of This Court's Jurisprudence

Petitioner's contention that the Court of Appeals' opinion will subject "countless state and federal court judgments to unwarranted automatic reversal for instructional errors" is similarly without merit. Contrary to Petitioner's mischaracterization, the Court of Appeals' holding rested upon a narrow application of established law to a specific and unique factual situation. The court's holding is consistent with the reasoning of this Court's prior opinions. Because the Court of Appeals' decision raises no critical or novel legal issues, certiorari is unwarranted.

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[4] Petitioner also contends, in a footnote, that because reasonable jurists disagree about whether the error (as incorrectly characterized by Petitioner) is structural, the Court of Appeals' decision constitutes a new rule prohibited by *Teague v. Lane*, 489 U.S. 288 (1989). As stated above, Petitioner misconstrues the holding of the Court of Appeals. Because there is no circuit conflict, there is no indication that reasonable jurists disagree with the actual holding of the Court of Appeals. This argument would not provide a basis for a grant of certiorari if one had been sought on this ground.

CONCLUSION

Petitioner's certiorari petition raises no worthy issues for review. In accordance with settled law, the Court of Appeals properly determined that an instruction which directs a verdict for the state is structural error. For the foregoing reasons, this Court should deny Petitioner's petition for writ of certiorari.

Dated: September 25, 2002

Respectfully submitted,

BARRY J. PORTMAN
Federal Public Defender

Alexandra McClure

ALEXANDRA MCCLURE*
Assistant Federal Public Defender

**Counsel of record for Respondent Powell*

No. 02-10

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2002

GEORGE M. GALAZA, Warden, *Petitioner*,

v.

MICHAEL JEROME POWELL, *Respondent*.

CERTIFICATE OF SERVICE BY MAIL

I, Alexandra McClure, counsel appointed pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(a)(2)(B), (d)(7), hereby certify that on this 25th day of September, 2002, forty copies of the Brief in Opposition to the Petition for Writ of Certiorari in the above-entitled case were mailed, first class postage prepaid, to the Clerk of the Supreme Court of the United States and within the time allowed for filing said Brief in Opposition was served on the following counsel:

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No. 02-10

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OCTOBER TERM, 2002

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v.

MICHAEL JEROME POWELL, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

A.	Opinion of the United States Court of Appeals for the Ninth Circuit filed March 2, 2002	1
B.	Order of the United States Court of Appeals for the Ninth Circuit filed April 16, 2002	20
C.	Order Denying Petition for Writ of Habeas Corpus from the United States District Court, Northern District of California filed December 13, 2000	21

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL JEROME POWELL, *Petitioner-Appellant,* v. GEORGE M. GALAZA, Warden, *Respondent-Appellee.*	No. 01-15195 D.C. No. CV-99-02271-MJJ OPINION

Appeal from the United States District Court
for the Northern District of California
Martin J. Jenkins, District Judge, Presiding

Argued and Submitted
December 7, 2001—San Francisco, California

Filed March 4, 2002

Before: Betty Binns Fletcher, Robert Boochever and
Raymond C. Fisher, Circuit Judges.

Opinion by Judge Fisher

SUMMARY

Criminal Law and Procedure/Jury Instructions

The court of appeals reversed a judgment of the district court. The court held that a trial court's midtrial instruction to the jury, at a trial for failure to appear at a sentencing hearing, that a defendant's own testimony satisfied the specific intent element of the crime—the only contested issue—violates the Fourteenth Amendment.

Appellant Michael Powell voluntarily approached the San Francisco police in 1994 with information about the murder of a two-year-old girl. According to Powell, the girl was shot and killed by a gang member who was actually shooting at someone else. Shortly after he spoke with the authorities about the girl's murder, Powell was arrested for possession of cocaine with intent to sell. While Powell was out on bail, he testified in the girl's murder trial. Powell expressed concern that he might face retaliation, but he elected to testify despite his anxiety. Powell pleaded guilty to his felony possession charge and was scheduled to be sentenced, facing a maximum sentence of four years. He failed to appear, however, at his sentencing hearing. One year later, he was arrested, charged with failure to appear and convicted by a jury. The state court sentenced him to 29 years to life in prison: four years for the underlying drug offense and 25 years to life because his failure to appear was his third-strike felony.

Under California law, the crime of failure to appear has two elements: (1) willful failure to appear as required and (2) specific intent to evade the process of the court. Powell's defense was that he did not specifically intend to evade the process of the court. At the preliminary hearing for his failure-to-appear charge, Powell's sister and wife testified that Powell had received death threats and was afraid for his life. Prior to the jury trial for failing to appear, the court ruled that Powell

could not testify about his reason for failing to appear at the sentencing hearing. The court reasoned that, because Powell was precluded from presenting a necessity defense, he should also be precluded from introducing evidence of his state of mind, as that evidence merely boiled down to a statement of necessity. Nonetheless, on direct examination, Powell testified that he was prepared to get four years state prison if he pleaded guilty to the drug charge and that he was willing to serve that sentence. He further testified that the only thing he was worried about was the gang member who was going to kill him when he went to prison.

The trial court instructed the jury that Powell's testimony did not negate the specific intent element and that in fact, it started with an admission that he intended to evade the court process. The trial court later charged the jury that it had not intended to intimate or suggest what it found to be the facts, or that it believed or disbelieved any witness. It also appeared to have delivered an instruction defining specific intent.

On direct review, the California Court of Appeal cursorily rejected Powell's objection that the midtrial instruction was unfair and prejudicial. The Court of Appeal denied Powell's petition for rehearing, and the California Supreme Court denied Powell's petition for review without opinion. The district court denied Powell's petition for federal habeas relief.

Powell appealed his conviction.

[1] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a petition for federal habeas relief may be granted only if the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. A state court's decision can be contrary to

federal law either (1) if it fails to apply the correct controlling authority, or (2) if it applies the controlling authority to a case involving facts materially indistinguishable from those in a controlling case, but nonetheless reaches a different result. In determining whether a state court decision is contrary to federal law, courts examine the last reasoned decision of a state court as the basis of the state court's judgment.

[2] Because the California Court of Appeal failed to cite to any federal law, much less the controlling Supreme Court precedents, and failed to apply the correct analysis as determined by those precedents, its decision was contrary to federal law. Habeas relief was also warranted because the state court reached an erroneous result. The trial court's instruction improperly removed the element of specific intent to evade the court process—the only contested issue—from the jury's consideration and in effect commanded a directed verdict for the state. This was error.

[3] A mandatory presumption—a specific instruction that both alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the state proves certain predicate facts—violates the Fourteenth Amendment because it directly forecloses independent jury consideration of whether the facts proved establish certain elements of the charged offense and relieves the state of its burden of proving by evidence every essential element of the crime beyond a reasonable doubt. [4] The trial court's instruction went beyond the mandatory presumption instructions that have been found unconstitutional. The jury was not merely instructed to find specific intent to evade the process of the court once it found certain predicate facts. Rather, the court stated that Powell's testimony started with an admission that he intended to evade the process of the court. Any reasonable juror easily could have understood this as an instruction that she or he was required to find the specific intent element satisfied. The court's later instructions were inadequate to undo the damage caused by the court's

earlier definitive statement. Thus, the midtrial instruction clearly violated constitutional principles. [5] The judgment of the district court had to be reversed.

COUNSEL

Alexandra McClure, Assistant Federal Public Defender, San Francisco, California, for the petitioner-appellant.

John R. Vance, Jr., Deputy Attorney General, San Francisco, California, for the respondent-appellee.

OPINION

FISHER, Circuit Judge:

In the middle of Michael Jerome Powell's trial for failure to appear at a sentencing hearing, the trial court instructed the jury that Powell's own testimony satisfied the specific intent element of the crime. Such an instruction is impermissible under the principles of *Carella v. California*, 491 U.S. 263 (1989), and *Sandstrom v. Montana*, 442 U.S. 510 (1979), and the reasoning of *Sullivan v. Louisiana*, 508 U.S. 275 (1993), dictates that harmless error review is inapplicable. Because the California Court of Appeal failed to apply, or even cite, the proper controlling Supreme Court authority, we reverse the district court's denial of the petition for writ of habeas corpus.

Factual and Procedural Background

Michael Jerome Powell is serving a sentence of 29 years to life in prison for failing to appear at a sentencing hearing. Having pled guilty to possession of cocaine with intent to sell, Powell faced a maximum jail term of four years. Powell testi-

fied that, although he was willing to serve his prison sentence, he skipped his sentencing hearing because he feared he would be killed in prison.

Powell had voluntarily approached the San Francisco police in early February 1994 with information about the January 28 murder of two-year-old Bianca Robinson. Bianca had been riding in the back of a car driven by Kelly Hollimon when Emanuel Davis, in a car with two friends, shot at Holliman but killed Bianca instead. According to Powell, Davis and his friends are members of the Black Guerilla Family ("BGF"), a known gang. In a taped statement, Powell told the authorities that he had witnessed a fight between Hollimon and Davis a few days before the shooting, during which Hollimon severely injured one of Davis' friends. Powell told the homicide investigators that he believed Davis and his friends wanted to take revenge against Hollimon.

Shortly after he spoke with the authorities about Bianca's murder, Powell was arrested in Marin County for possession of cocaine with intent to sell, in violation of California Health & Safety Code § 11351.5. In late November or early December 1994, while Powell was out on bail, he reluctantly testified in the Bianca Robinson murder trial. Powell expressed concern that he might face retaliation, but he elected to testify despite his anxiety.

Powell pled guilty to his felony possession charge on November 23, 1994 and was scheduled to be sentenced on February 23, 1995, facing a maximum sentence of four years. He failed to appear, however, at his sentencing hearing. One year later, he was arrested, charged with failure to appear in violation of California Penal Code § 1320.5 and convicted by a jury. The state court sentenced him to 29 years to life in prison — four years for the underlying drug offense and 25

years to life because his failure to appear was his third-strike felony.[1]

Under California law, the crime of failure to appear has two elements: (1) willful failure to appear as required and (2) specific intent to evade the process of the court. Cal. Penal Code § 1320.5; *see People v. Forrester*, 37 Cal. Rptr. 2d 19, 21 (Cal. Ct. App. 1994). Powell's defense was that he did not specifically intend to evade the process of the court.

At the preliminary hearing for his failure-to-appear charge, Powell's sister and wife testified that Powell received death threats in early January 1995 — the number 187 (the California Penal Code section for murder) appeared repeatedly on his pager and the phone number for a mortuary appeared on his pager on one occasion. Powell's sister testified that around this time (between December 1994 and March or April 1995), Powell "looked like he was afraid . . . for his life," that he refused to tell her or their father where he was living and that he urged them to stay away from his father's neighborhood. Powell's wife testified that an unidentified man, screaming "something about testifying," shot at her and Powell while they were in the car. The Powells did not report any of these incidents to the police.

Prior to the jury trial for failing to appear, the court ruled that Powell could not testify about his reason for failing to appear at the sentencing hearing. The court reasoned that, because Powell was precluded from presenting a necessity defense, he should also be precluded from introducing evidence of his state of mind, as that evidence merely "boil[ed] down to a statement of necessity."[2]

---

[1]Powell contends that his sentence constitutes cruel and unusual punishment. We decline to reach this issue because we vacate his conviction on another ground.

[2]The trial court's ruling that the necessity defense was unavailable to Powell is not before us. In an unpublished opinion, the California Court

Nonetheless, on direct examination, Powell testified that he was "prepared to get four years state prison" if he pled guilty to the drug charge and that he was willing to serve that sentence. He further testified,

> The only thing I was really worried about was the BGF member that was going to kill me when I got to San Quentin. That was the only thing I was worried about. That's what we [Powell and his probation officer] discussed in full length.

The prosecution objected that this testimony violated the court's pretrial ruling, but the court permitted Powell to continue. Powell further stated, "we had been shot at and everything already, and I already knew what was coming to me while I was — you know, trying to kill me. I got scared for my life. That's the truth." Powell also testified that he was not "trying to get away from anything that . . . the court was going to do to [him]" and that he was not "trying to avoid the court's sentence." The prosecutor subjected Powell to scathing cross-examination on this subject, filling 23 transcript pages. At the end of the day's testimony, the court admon-

---

of Appeal affirmed the trial court's decision to deny Powell the necessity defense. The appellate court explained that, while it was unclear whether a defendant charged with failure to appear could invoke the necessity defense in the first instance, Powell certainly could not do so because he failed to satisfy the following required elements:

> (1) [A] specific threat of death, forcible sexual attack or substantial bodily injury in the immediate future; (2) [N]o time for a complaint to the authorities or . . . a history of futile complaints which make any result from such complaints illusory; (3) [N]o time or opportunity to resort to the courts . . . and (5) The [defendant] immediately reports to the proper authorities when he has attained a position of safety from the immediate threat.

(Internal quotations omitted and citing *People v. Lovercamp*, 118 Cal. Rptr. 110, 115 (Cal. Ct. App. 1974) (holding that necessity is possible defense to charge of escape from prison)).

ished Powell and his attorney for violating the pretrial order, instructed the jury that the necessity defense was not available in this case and — in terms that are at issue here — further instructed the jury that Powell's testimony did not negate the specific intent element:

> The other thing about it is, it doesn't relate in the slightest to the subject of intent. In fact, if you look carefully and logically at what has been said here about why the defendant didn't come to court, it doesn't vindicate or eliminate the intention to evade the court process. In fact, it starts with an admission that he intended to evade the court process.
>
> So, it doesn't eliminate the mental element of this offense either. What he's saying by his repeated statements against my order is that he didn't come to court because he wanted to evade the process of the court, because he knew in all reason that he was going to be sent to prison. And that's what the element or the intentional element of this offense is about: Intent to evade the court process.

The court also forbade Powell's attorney from revisiting the issue on redirect examination or presenting any additional evidence to rehabilitate Powell.[3]

Four days later, at the end of the trial, the court further charged the jury:

> I have not intended by anything I have said or done, or by any questions that I may have asked, or

[3]Because we vacate Powell's conviction on the ground that the trial court's midtrial instruction violated the Fourteenth Amendment, we decline to reach Powell's claim that the trial court violated his Sixth Amendment right to present a defense by refusing to allow Powell to be rehabilitated on redirect examination.

> by any ruling I may have made to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own conclusion . . . .
>
> . . . .
>
> Whether some instructions apply will depend upon what you find to be the facts. Disregard any instruction which applies to facts determined by you not to exist. Do not conclude that because an instruction has been given that I am expressing an opinion as to the facts.

The court also appears to have delivered an instruction defining specific intent, as well as the following instruction:

> If you find that the defendant willfully failed to appear within 14 days of his assigned appearance date, you are permitted but are not required to infer therefrom that defendant intended to evade the process of the court.

On direct review of Powell's conviction, the California Court of Appeal cursorily rejected Powell's objection that the midtrial instruction was unfair and prejudicial, stating that "Powell's evidence, including that which he was precluded from introducing, did not support a defense of necessity and did not negate the element of intent to evade the court process. It follows that no direct prejudice resulted from so informing the jury." The Court of Appeal denied Powell's petition for rehearing, and the California Supreme Court denied Powell's Petition for Review without opinion. Powell sought federal habeas relief, and the district court denied his

amended petition on December 13, 2000. Powell timely appealed to this Court.

Standard of Review

[1] We review de novo a district court's decision to deny a 28 U.S.C. § 2254 habeas petition. *Lockhart v. Terhune*, 250 F.3d 1223, 1228 (9th Cir. 2001); *Charles v. Hickman*, 228 F.3d 981, 985 (9th Cir. 2000). Because Powell's petition was filed after April 24, 1996, it is subject to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *Lockhart*, 250 F.3d at 1228. Therefore, the petition may be granted only if:

> the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). "A state court's decision can be 'contrary to' federal law either 1) if it fails to apply the correct controlling authority, or 2) if it applies the controlling authority to a case involving facts 'materially indistinguishable' from those in a controlling case, but nonetheless reaches a different result." *Van Tran v. Lindsey*, 212 F.3d 1143, 1150 (9th Cir. 2000) (citing *Williams v. Taylor*, 529 U.S. 362, 405-07 (2000) (O'Connor, J.)), *cert. denied*, 531 U.S. 944 (2000). In determining whether a state court decision is contrary to federal law, we will examine the "last reasoned decision of a state court as the basis of the state court's judgment." *Packer v. Hill*, 277 F.3d 1092, 1101 (9th Cir. 2002).

Analysis

[2] The Supreme Court's holdings in *Carella v. California*, 491 U.S. 263 (1989), and *Sandstrom v. Montana*, 442 U.S. 510 (1979), provide the controlling authority here. Because the California Court of Appeal "failed to cite to any federal law, much less the controlling Supreme Court precedents" — *Carella* and *Sandstrom* — and failed to apply the correct analysis as determined by those precedents, its decision was contrary to federal law. *Packer*, 277 F.3d at 1101 (also noting that state court incorrectly articulated federal law); *see also Shackleford v. Hubbard*, 234 F.3d 1072, 1077 (9th Cir. 2000) ("Under the 'contrary to' clause, a federal court should grant the writ . . . when the state court has failed to apply the correct controlling authority from the Supreme Court . . . ."), *cert. denied*, 122 S. Ct. 324 (2001). Moreover, habeas relief is warranted because the state court reached an erroneous result.[4] *See Packer*, 277 F.3d at 1102 ("Given our conclusion that the state court failed to apply clearly established federal law, we must now determine whether its decision constituted error . . . .").[5] The trial court's instruction improperly removed the element of specific intent to evade the court process — the only contested issue — from the jury's consideration and in effect commanded a directed verdict for the state. Under *Carella* and *Sandstrom*, this was error.

[3] In *Carella*, the Supreme Court reiterated its rule that a mandatory presumption — a specific instruction that "both

[4]Because we are proceeding under the "contrary to" prong, rather than the "unreasonable application" prong, it is sufficient that the state court result was erroneous, rather than clearly erroneous. *See Packer*, 277 F.3d at 1102 n. 12. In any event, we are "left with a 'definite and firm conviction' that an error has been committed." *Van Tran*, 212 F.3d at 1153.

[5]The *Packer* court also considered "whether the error had a substantial or injurious effect on the verdict." *Packer*, 277 F.3d at 1102. Because we hold that harmless error review is inapplicable here, we need not determine whether the state court's error was harmless under the standard enunciated in *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993).

alone and in the context of the overall charge, could have been understood by reasonable jurors to require them to find the presumed fact if the State proves certain predicate facts" — violates the Fourteenth Amendment because it "directly foreclose[s] independent jury consideration of whether the facts proved establish[ ] certain elements of [the charged offense] . . . and relieve[s] the State of its burden of . . . proving by evidence every essential element of [the] crime beyond a reasonable doubt." 491 U.S. at 265-66 (citing *In re Winship*, 397 U.S. 358, 364 (1970), and *Francis v. Franklin*, 471 U.S. 307 (1985)); *accord Sandstrom v. Montana*, 442 U.S. 510 (1979) (holding unconstitutional instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts" because the jury could have interpreted it as either a burden-shifting or conclusive presumption).

[4] Here, the trial court told the jury that Powell's testimony was "an admission that he intended to evade the court process," and that

> [w]hat [Powell is] saying by his repeated statements against [the court's] order is that he didn't come to court because he wanted to evade the process of the court, because he knew in all reason that he was going to be sent to prison. And that's what . . . the intentional element of this offense is all about: Intent to evade the court process.

This instruction went beyond the mandatory presumption instructions found unconstitutional in *Carella* and *Sandstrom*. The jury was not merely instructed to find specific intent to evade the process of the court once it found certain predicate facts. Rather, the court stated that Powell's testimony "starts with an admission that he intended to evade the process of the court." Any reasonable juror easily could have understood this as an instruction that she or he was required to find the specific intent element satisfied. Moreover, the court's later instructions were inadequate to undo the damage caused by

the court's earlier definitive statement. The court's qualification that "I have not intended by anything I have said or done . . . to intimate or suggest what you should find to be the facts" was too general and too late to ensure that the jurors would entirely disregard the court's instruction that the only contested issue in the case should be decided against Powell. Therefore, the midtrial instruction clearly violated the principles enunciated in *Carella* and *Sandstrom*.

We further hold that harmless error review is inapplicable. The Supreme Court has recognized that "some constitutional errors require reversal without regard to the evidence in the particular case [because] some errors necessarily render a trial fundamentally unfair." *Rose v. Clark*, 478 U.S. 570, 577 (1986) (stating that "harmless-error analysis presumably would not apply if a court directed a verdict for the prosecution in a criminal trial by jury"), *overruled in part by Brecht v. Abrahamson*, 507 U.S. 619, 637 (1997) (rejecting harmless error formulation of *Chapman v. California*, 386 U.S. 18, 24 (1967)). This applies on habeas review as well as on direct review. *See Conde v. Henry*, 198 F.3d 734, 741 (9th Cir. 2000) (refusing to apply harmless error review in consideration of petition for writ of habeas corpus where structural errors rendered trial fundamentally unfair).

The Court in *Carella* explained that a mandatory presumption instruction can be reviewed for harmless error because it is not equivalent to a directed verdict for the state — the jury is still required to find the predicate facts underlying each element beyond a reasonable doubt. *Carella*, 491 U.S. at 266; *see also Rose*, 478 U.S. at 579-80 (holding that instruction that impermissibly shifts burden of proof on malice element is subject to harmless error review). The instruction here, however, is effectively the same as a directed verdict for the state, closely resembling the instructions criticized in *United States v. Johnson*, 71 F.3d 139 (4th Cir. 1995), and *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984), where the trial courts instructed the juries that a required element had been

satisfied. *See Johnson*, 71 F.3d at 141 (trial court conclusively instructed the jury that the robbed credit union was a federally insured credit union within the meaning of the relevant statute); *Goetz*, 746 F.2d at 707-08 (trial court instructed the jury that the documents submitted by the defendants were not tax returns); *see also United Bhd. of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 408-09 (1947) (reversing conspiracy convictions because trial court did not include instruction reflecting § 6 of the Norris-LaGuardia Act, which limited imputed liability of officer, member or organization "participating or interested in a labor dispute," and stating that "a judge may not direct a verdict of guilty no matter how conclusive the evidence"), *superseded by statute on other grounds*.

An instruction that a particular element has been satisfied cannot be reviewed for harmless error because the wrong entity — the judge rather than the jury — becomes involved in rendering the verdict. That is, the guilty verdict cannot be said to emanate from the jury because the judge provides a necessary step in reaching that verdict. In such circumstances, "[t]he most that an appellate court can conclude is that a jury *would surely have found* petitioner guilty beyond a reasonable doubt — not that the jury's actual finding of guilty beyond a reasonable doubt *would surely not have been different* absent a constitutional error. That is not enough." *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) (holding that defective reasonable doubt instruction will not be reviewed for harmless error because the jury never actually rendered a guilty verdict and because instruction constituted structural error). *Cf. Conde*, 198 F.3d at 740-41 (refusing to apply harmless error analysis where failure to allow closing argument on defense theory, refusal to instruct jury on that theory and erroneous instruction combined to deprive defendant of fair trial). Because "there has been no jury verdict within the meaning of the Sixth Amendment," we refuse to review the instruction here for harmless error. *Sullivan*, 508 U.S. at 280.

Respondent urges us to analyze the judge's midtrial instruction under *Quercia v. United States*, 289 U.S. 466 (1933). We believe the instruction is more appropriately analyzed under *Carella* than *Quercia*, which addressed the proper limits on a trial judge's comments to the jury. *Quercia* is distinguishable because the court here was not merely commenting on the evidence or making passing remarks during the course of the trial. Rather, as the court itself recognized, it was instructing the jury about the specific intent element.[6] Accordingly, the trial judge's statement should be assessed under the standards employed in scrutinizing other jury instructions, and *Carella* and *Sandstrom*, rather than *Quercia*, constitute the correct controlling authority. In any event, the result is also erroneous under *Quercia* and its progeny.

In *Quercia*, after the trial court charged the jury, it stated:

> And now I am going to tell you what I think of the defendant's testimony. You may have noticed, Mr. Foreman and gentleman, that he wiped his hands during his testimony. It is a rather curious thing, but that is almost always an indication of lying . . . . I think that every single word that man said, except when he agreed with the Government's testimony, was a lie.
>
> Now, that opinion is an opinion of evidence and is not binding on you, and if you don't agree with it, it is your duty to find him not guilty.

[6]Immediately prior to issuing the contested instruction, the court suggested that "maybe in the process of hoisting [Powell and his attorney] on their own Pitards I would contemplate the possibility of instructing the jury on necessity and on the issues of the question of intent at this juncture so they don't go home with some misimpression of what's going on here." After the prosecutor agreed, the judge directed that the jury be brought back in so that he could "instruct them." As the court itself characterized what it was about to do as an instruction, we decline to assess the language as mere comment.

Id. at 468-469. The Supreme Court stated that a trial judge "may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination." *Id.* at 469. The Court reversed the defendant's conviction because the trial judge added to the evidence and "put his own experience, with all the weight that could be attached to it, in the scale against the accused." *Id.* at 471. Moreover, the Court rejected the argument that the latter portion of the statement cured the error, because the judge did not withdraw his opinion and it was "of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence." *Id.* at 472.

As in *Quercia*, the trial court's comments went far beyond innocuous "analysis" of the evidence. Although the trial court here did not explicitly say that Powell was lying, its statements were just as damaging. Upon the heels of Powell's testimony indicating that he did not intend to evade the process of the court, the trial court told the jury that the substance of Powell's testimony amounted to an admission of specific intent to do just that. The court failed to follow its opinion regarding Powell's testimony with an immediate reminder that the jury could disregard the court's opinion because the jury alone was responsible for determining the specific intent element. Accordingly, the trial court's statement was clearly erroneous under *Quercia*.

The Ninth Circuit authority cited by Respondent does not suggest otherwise. In *Rodriguez v. Marshall*, 125 F.3d 739 (9th Cir. 1997), the trial judge noted that there had been conflicting evidence and highlighted questions the jurors might have wished to take into account when considering the testimony of one particular witness. The trial court also interspersed these comments with "cautionary admonitions" that it was the jury's responsibility to determine the facts using its own independent judgment. *Id.* at 749. We held that the trial judge's comments were permissible because he "repeatedly

reminded members of the jury that they were to determine the facts of the case based on their own view of the evidence." *Id.* Similarly, in *United States v. James*, 576 F.2d 223 (9th Cir. 1978), the trial court explained its view of the significance of certain testimony and the relationship between the different counts. *Id.* at 227-28. Unlike both *Rodriguez* and *James*, the trial judge here made a conclusive statement about the significance of Powell's testimony and failed to accompany his statement with any caveat or reminder that the jury was ultimately responsible for determining the intent element. *See People v. Rodriguez*, 230 Cal. Rptr. 667, 693 n. 10 (1986) (quoting text of challenged statement); *James*, 576 F.2d at 228 n. 5 (same); *see also Bradley v. United States*, 338 F.2d 493, 494-95 (9th Cir. 1964) (holding erroneous instruction regarding admissions made by defendant to be nonprejudicial in light of accompanying cautionary language). The trial judge's later instruction — delivered four days after the damaging instruction at issue — did not explicitly refer to his earlier statement or otherwise alert the jury to the connection.[7] *See James*, 576 F.2d at 229 (finding significant the later instruction that "I have made mention of the evidence but not in any manner for the purpose of suggesting to you whether or not I think Mr. James is guilty . . . . [A]ny view that I might have with respect to the guilt or innocence of Mr. James . . . is altogether beside the point. Yours is the job of making that determination."). Consequently, the midtrial instruction was impermissible even under *Quercia* and its progeny.

Conclusion

Powell's conviction must be vacated because the court's midtrial instruction effectively directed the jury to find for the state on the specific intent element. Indeed, because specific intent was the only contested issue in the case, the trial court's instruction essentially directed a verdict of guilty and thus

[7]Even if the court had issued an adequate curative instruction, that would "not end the inquiry." *James*, 576 F.2d at 229.

clearly violated the principles articulated in *Carella* and *Sandstrom*. Moreover, *Sullivan* commands that harmless error review is inapplicable.

[5] We therefore reverse the district court, vacate Powell's conviction and remand the case to the district court, with instructions to grant the writ of habeas corpus conditionally and to remand to the state court, directing that the State of California may retry Powell for failure to appear, if it is done within a reasonable period of time, consistent with the state's speedy trial requirements.

REVERSED AND REMANDED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
APR 16 2002
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

MICHAEL JEROME POWELL,

Petitioner-Appellant,

v.

GEORGE M. GALAZA, Warden,

Respondent-Appellee.

No. 01-15195

D.C. No. CV-99-02271-MJJ

ORDER

RECEIVED
APR 17 2002
Federal Public Defender
San Francisco

BEFORE: B. FLETCHER, BOOCHEVER and FISHER, Circuit Judges.

The panel has voted to deny appellee's petition for rehearing. Judge Fisher voted to reject the suggestion for rehearing en banc, and Judge Fletcher and Judge Boochever recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing with suggestion for rehearing en banc, filed March 15, 2002, is DENIED.

United States District Court
For the Northern District of California

FILED

DEC 13 2000

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MICHAEL JEROME POWELL,

Petitioner,

v.

GEORGE GALAZA,

Respondent.
_____/

No. C 99-2271 MJJ

ORDER DENYING PETITION FOR WRIT OF *HABEAS CORPUS*

Before the Court is a petition for writ of *habeas corpus* filed by Michael Jerome Powell ("Powell") challenging the validity of his state conviction and sentence pursuant to 28 U.S.C. § 2254. Having reviewed the moving and responding papers in addition to the supplemental materials filed by the parties, and for the reasons set forth herein, the Court DENIES Powell's petition for writ of *habeas corpus*.

I. BACKGROUND AND PROCEDURAL POSTURE

Powell pled guilty to possession of narcotics for sale in violation of California Health and Safety Code § 11351 (SC059022) on November 23, 1994.[1] The court set sentencing for February 23,

[1] In November or December of 1994, Powell testified for the Prosecution against a Black Guerilla Family ("BGF") member who was on trial for the murder of a two-year-old child. Powell had witnessed a fight between this BGF member and Powell's acquaintance, Mr. Holliman. This BGF member later attacked Mr. Holliman by shooting at Mr. Holliman's car, killing the two-year-old victim riding in Holliman's car. Powell testified against the BGF member despite his fears of

1995, and continued Powell on bail. Powell met with a probation officer prior to his sentencing and during the meeting Powell was informed that the probation officer intended to recommend a four-year prison sentence.[2] The probation officer also reminded Powell of his February 23, 1995 sentencing date. However, Powell failed to appear for sentencing on February 23, 1995, and the court issued a bench warrant. Powell was arrested by police on February 23, 1996 and charged with failure to appear while on bail, in violation of California Penal Code § 1320.5 (SC086106). Powell pled not guilty and received a jury trial at which he testified. The jury convicted Powell of failing to appear while on bail and found true all three underlying offenses which the state had charged as possible first and second strikes.[3] On December 23, 1996, the trial court sentenced Powell to an indeterminate sentence of 25 years to life for the failure to appear conviction and to a consecutive terms of 4 years for the underlying possession conviction, a total term of 29 years to life.

Powell appealed his conviction to the California Court of Appeal, which affirmed Powell's conviction and sentence on October 20, 1998. Powell's petition for rehearing was denied on November 11, 1998. Powell filed a Petition for Review with the California Supreme Court on November 9, 1998, which was denied on January 1, 1999. On May 18, 1999, Powell filed his original pro per *habeas* petition. On May 1, 2000, this Court granted Powell's motion to file an amended petition. The three grounds upon which Powell seeks federal *habeas* relief have all been exhausted.

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retaliation by the BGF. Powell asserts that soon after his testimony, he received numerous death threats including the numbers "187," the California Penal Code section for murder on his pager, the phone to a mortuary on his pager, and an unknown assailant who fired at the car which Mr. Powell and his wife were riding in. *See* Pet. at 2-3.

[2] Powell asserts that he informed the probation officer at this meeting that he had received the above described death threats, and that he feared for his life in custody and in the community. *See* Pet. at 3.

[3] Those underlying offenses were: (1) a 1982 robbery conviction for a purse snatching; (2) a 1986 grand theft conviction for stealing a jewelry display from the victim; and (3) a 1988 burglary conviction for stealing a bicycle from a garage. *See* Pet. at 1.

United States District Court
For the Northern District of California

II. STANDARD OF REVIEW

With the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter "AEDPA"),[4] a federal court "shall not" grant an application for a writ of habeas corpus by a state prisoner unless the state court's earlier resolution of the claim "(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (1999). In Williams v. Taylor, 120 S.Ct. 1495 (2000), the Supreme Court clarified the guidelines in § 2254(d), holding that the determination to be made on federal *habeas* review is whether the state court's determination was objectively unreasonable, not merely incorrect. Id. at 1498. The Court will grant *habeas* relief only if it finds: (1) that a constitutional error occurred at the state court level, and (2) that such error had "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 113 S.Ct. 1710, 1722 (1993). Petitioner bears the burden of establishing that the constitutional error had a substantial and injurious effect or influence in determining the jury's verdict. Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir. 1997).

III. ANALYSIS

In his amended federal *habeas corpus* petition, Powell asserts the same three claims presented in his state petitions: (1) the trial court's mid-trial instruction to the jury that intent, the sole contested issue, had been met by Powell's own admission deprived him of his right to due process; (2) after the trial court had permitted cross-examination regarding his fear of retaliation, he was deprived of his due process right to present a defense when the trial court prevented him from explaining his responses on redirect; and (3) the 25 years to life sentence he received for a third strike failure to appear conviction violates the Eight Amendment's prohibition against cruel and

[4] The AEDPA applies to Powell's petition because it was filed after the Act's effective date.

United States District Court
For the Northern District of California

unusual punishment.

A. **Trial Court's Mid-Trial Instruction**

Powell claims that the trial court's mid-trial instruction to the jury eliminated the element of intent from the failure to appear charge, thereby directing a verdict for the prosecution. Furthermore, Powell asserts that the removal of the element of intent from the jury's consideration had a substantial and injurious effect and influence in determining the jury's verdict, and therefore, cannot be considered harmless. The Court disagrees with Powell's characterization of the trial court's comments to the jury as an instruction that removed the element of intent from the jury's consideration. Even if the trial court's comments constituted error, under harmless error review it did not have a substantial and injurious effect or influence on the jury's verdict and does not warrant *habeas* relief.

United States Supreme Court and Ninth Circuit precedent establishes that a trial judge may comment on the evidence so long as he makes it clear that it is the duty of the jury to determine the facts themselves. See Quercia v. United States, 289 U.S. 466, 469 (1933); Rodriguez v. Marshall, 125 F.3d 739, 749 (9th Cir. 1997); Duckett v. Godinez, 67 F.3d 734, 739 (9th Cir. 1995); United States v. Mostella, 802 F.2d 358, 361 (9th Cir. 1986); United States v. James, 576 F.2d 223, 228 (9th Cir. 1978). In Quercia the United States Supreme Court found that it is within the province of the trial judge, whenever he thinks it necessary,

> to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important, and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination.

Quercia, 289 U.S. at 469. The Court further stated that the trial judge may analyze and dissect the evidence, but he may not either distort it or add to it. See id. at 470. In that case, the trial judge pointed out to the jury that the defendant had wiped his hands while testifying and that this was "almost always an indication of lying." See id. at 468. The Court concluded that the trial judge's comments to the jury were highly prejudicial error because he had not reviewed the evidence

United States District Court
For the Northern District of California

to assist the jury in reaching the truth, rather he "repudiated as a lie all that the accused had said in his own behalf." See id. at 472.

In Rodriguez, the Ninth Circuit found a trial judge's comments to the jury permissible, where he mentioned that all of the witnesses were testifying about the time of events within an estimated range and that the estimates may or may not be determinative of the ultimate issues before the jury. See Rodriguez, 125 F.3d at 749. The court found that the trial judge's comments merely drew the jurors' attention to parts of the evidence which he believed would assist the jury and did not distort the evidence. See id. at 749-750. Similarly, in Mostella, the Ninth Circuit found that the trial judge's questions were intended to clarify the evidence and did not evidence partisanship, and therefore, there was no error. See Mostella, 576 F.2d at 362. Furthermore, the court emphasized that the court expressly cautioned the jury not to infer from any of its questions that it had any views regarding the credibility of the witnesses or the guilt or innocence of the defendant. See id.

In James, the Ninth Circuit also determined that the trial judge's comments to the jury were permissible. See James, 576 F.2d at 228-229. In that case, the trial judge instructed the jury, "if you find beyond a reasonable doubt that Mr. James was the person who made the telephone calls, it seems to me that you could conclude that the offense was committed. . ." See id. at 228. The court found that it was not impermissible for the trial judge to indicate that he saw little dispute over whether the elements of the offenses were established. See id. Furthermore, the court found that a review of the record in its entirety led to the conclusion that the judge's comments did not leave the jury with the impression that they were not free to perform their traditional fact finding function because the judge had expressly instructed the jury that it would be the final arbiter of all questions of fact. See id. at 228-229.

The facts in Powell's case are distinguishable from those in Quercia and more apposite to the facts in Rodriguez, Mostella, and James. The two comments made by the trial judge which Powell challenges are:

(1) In fact, it starts with an admission that he intended to evade the court process.

(2) What he's saying by his repeated statements against my order is that he didn't

United States District Court
For the Northern District of California

come to court because he wanted to evade the process of the court, because he knew in all reason that he was going to be sent to prison.

See Petition at 6-7. Powell's assertion that the trial judge removed the element of intent from the jury's consideration, and thereby directed a verdict for the prosecution, mischaracterizes the trial judge's comments and considers them out of context. The Court disagrees with Powell's assertion that the trial court's comments instructed the jury that intent to evade the process of the court had been satisfied by Powell's own admission. When considered in context, the trial judge's comments to the jury were simply an explanation of the testimony offered by Powell. These comments were made in the course of the trial judge's lengthy explanation to the jury regarding why the necessity defense was not available to Powell and why his testimony was irrelevant to the specific intent element of the offense. See Answer at 10-11.[5] In addition, the trial judge's comment that "it starts

[5] The trial judge's comments to the jury were as follows: "I told you orally in the process that sympathy and penalties are not jury consideration. They have to do with the court's responsibility at the time of sentencing. And compassion and sympathy do not have a place there. There's been an injection of information into the process here, over my specific instruction to the contrary, which relates to sympathy and perhaps to penalty that's no place in your consideration at all, based upon my clear rulings and my clear instructions to counsel.

"You may actually get some more information on the subject because, in fariness, I'm going to let the prosecutor ask other questions to flesh out the subject now that it's been raised, but I wanted to make sure you understand as you go home this weekend that there is a doctrine in the law called 'necessity' that provides that in some limited circumstances where a person does something which might ordinarily be a criminal act it isn't a criminal act if excused by some recognizable necessity.

"So, for instance, if your neighbor's tree is on fire and about to fall on your house you can probably under the right circumstances get away with going next door and chopping the tree down before it falls on your house so it doesn't burn your house down.

"In San Francisco, during the fire - - earthquake and fire that followed, buildings were blown up in what might otherwise be criminal acts in order to avoid the spread of the fire. That's what necessity involves. In particular, an immediacy of significant bad consequences and the need for immediate action of a particular kind.

"Now, the doctrine of necessity clearly fleshed out in cases - - some of which are very close to what we're talking about here in the court now because it's been injected by defense testimony - - says that isn't necessity. And that defense is not available in circumstances where you have other recourse, such as, telling your parole officer, telling your probation officer, and other recourse to have it dealt with, so that you could be maintained if the problem seems to be that you think you're going to be hurt in prison. You can be maintained in such a way as to avoid that hurt. And you have an obligation first and foremost to follow the legal process and refer the problem to those who can deal with it.

"And you cannot invoke the doctrine of necessity to excuse an illegal act in those circumstances. That defense is simply not available here in this case. And I've explained and re-explained it to the defendant and his attorney, and told them not to waste your time and the court's time trying to inject it here.

"The other thing about it is, it doesn't relate in the slightest to the subject of intent. In fact, if you look carefully and logically at what has been said here about why the defendant didn't come to court, it doesn't vidicate or eliminate the intention to evade the court process. In fact, it starts with an admission that he intended to evade the court process.

"So, it doesn't eliminate the mental element of this offense either. What he's saying by his repeated statements against my order is that he didn't come to court because he wanted to evade the process of the court, because he knew in all

United States District Court
For the Northern District of California

with an admission that he intended to evade the court process." is similar to the trial judge's comment in James which the Ninth Circuit concluded was permissible. As in James, the trial judge merely pointed out a fact not in dispute, in the context of his comments about necessity and intent: that Powell admitted he intended to evade the court process. It is entirely permissible for a trial judge to analyze and dissect the evidence, so long as the judge does not distort it nor add to it. See Quercia, 289 U.S. at 470. Here, the trial judge was simply analyzing Powell's testimony in the context of his explanation to the jury and he did not distort it nor add to it.

Furthermore, as respondent points out, Powell does not dispute the propriety of the trial judge's explanation to the jury about the necessity defense and why it was unavailable to Powell. In context, the trial judge's comments were appropriate because they were necessary to his explanation of the nature of a necessity defense and the nature of the element of specific intent. The trial judge was explaining to the jury that Powell's reason for failing to appear had absolutely nothing to do with explaining that there was not an intentional evasion of the court's process. In other words, the trial judge told the jury that he had directed Powell not to speak about his reason for failing to appear because his motive for failing to appear did not explain whether he intended to evade the process of the court. Furthermore, the trial court explained that the purpose of his comments was to prevent the jurors from going home confused and to reiterate that the jury was not to consider sympathy and penalty in their deliberations. See Answer at 11.

Consideration of the trial judge's comments in context leads to the conclusion that the trial judge was only explaining to the jury why Powell's testimony was not relevant to negate the element of specific intent and why the necessity defense was not available to Powell. The trial judge's comments did not remove the element of intent from the jury's consideration, nor did the comments

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reason that he was going to be sent to prison. And that's what the element or intentional element of this offense is about: intent to evade the court process.

"Now, when you get to the point were he wants to say, 'But there was this great reason - -' okay, that's something that the Court might consider at the time of sentencing, but it has absolutely nothing to do with explaining that there was not an intentional evasion of the court's process, which was one of the elements of the offense, which is the intent to evade court process. It doesn't do that. And that's why I told them not to waste our time with that here." See Answer at 10-11 (quoting Exh. F, RT 284-286).

United States District Court
For the Northern District of California

direct a verdict for the prosecution. Powell erroneously asserts that the trial court repeatedly told the jury that any further consideration of the "mental intent" would only be a waste of time. See Traverse at 5:1-2. Powell cites several comments, out of context, made by the trial judge in support of this assertion: (1) "[b]ut it does not explain away the mental element of the offense, which is the intent to evade the court process. It doesn't do that. And that's why I told them not to waste our time here;" and (2) "[a]nd I've explained and reexplained it to the defendant and his attorney, and told them not to waste your time and the Court's time trying to inject it here." See Traverse at 5. Contrary to Powell's assertions, the trial judge did not repeatedly instruct the jury that the intent element was satisfied and that "any further consideration would only be a 'waste of time.'" See id. Rather, the comments clarify the distinction between the necessity defense, for which Powell's testimony was unhelpful and improper, and the intent element of the failure to appear offense.[6] Powell's assertion is nothing more than his erroneous interpretation of the trial judge's comments taken out of context.

Again, when considered in the context of the trial judge's explanation to the jury about why the necessity defense was not available to Powell and why the testimony did not eliminate the mental element of the offense, the comments did not instruct that the intent element was satisfied. Therefore, they did not direct a verdict for the prosecution. The trial judge told the jury that he had explained to Powell and his defense counsel that the necessity defense was not available in the case and that Powell should not waste the jury's and the court's time trying to inject it. See Answer at 11:4-7. Similarly, the trial judge explained to the jury that he told defense counsel not to waste the court's time explaining Powell's motive for failing to appear because it had absolutely nothing to do with the intent to evade court process. See Answer at 11:16-20.

[6] See supra note5.

United States District Court
For the Northern District of California

In addition, the trial court instructed the jury on all the elements of the crime which the prosecution had to prove[7]. See Answer at 16. Also, at the conclusion of the trial, the court instructed the jury as follows:

> I have not intended by anything I have said or done, or by any questions that I have asked, to suggest what you should find to be the facts or that I believe or disbelieve any witness. If anything I have done or said has seemed to so indicate, disregard it and form your own conclusion.

See Answer at 16. In accordance with United States Supreme Court and Ninth Circuit precedent, the trial judge made it clear to the jury that all matters of fact were submitted for their determination and that they were free to perform their traditional fact finding function. See Quercia, 289 U.S. at 489; James, 576 F.2d at 228-229. Accordingly, this Court concludes that the trial judge did not commit error because his comments to the jury were not contrary to, nor an unreasonable application of clearly established United States Supreme Court precedent. Therefore, *habeas* relief on this claim is not warranted.[8]

B. Deprivation of Powell's Right to Present a Defense

Powell asserts that he was "deprived of his right to present a defense when the trial court prevented him on redirect from explaining his responses after the court had permitted cross-examination regarding this fear of retaliation." See Pet. at 12. To the contrary, Respondent asserts that Powell's claim concerns a state evidentiary ruling which is not reviewable in a federal *habeas*

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[7] The trial court instructed the jury, in part, as follows: " [i]n order to prove such crime, the following elements must be proved: '[ ] With specific intent to evade the process of the court; [he] [w]ilfully failed to appear as required. [ ] The word 'wilfully' when applied to the intent with which an act is done or omitted means with a purpose or willingness to commit the act or to make the omission in question. The word 'wilfully' does not require any intent to violate the law, or to injure another, or to acquire any advantage." See Answer at 16.

[8] Powell contends that the trial judge's comments constitute structural error requiring automatic reversal. See Pet. at 11:18-21. As discussed above, this Court has found that the trial judge's comments did not constitute error. Even if this Court found error, it would apply harmless error analysis, *i.e.*, whether the error had a substantial and injurious effect or influence on the jury's verdict. As noted above, the trial court instructed the jury on all the elements of the offense to be proved by the prosecution beyond a reasonable doubt. In addition, the trial court instructed the jury that they were the trier of fact and to form their own conclusions. In light of the analysis above, this Court finds that any error committed by the trial court did not have a substantial and injurious effect or influence on the jury's verdict, and thus, *habeas* relief is not warranted.

United States District Court
For the Northern District of California

proceeding unless the petitioner shows that the state court evidentiary ruling so fatally infected the proceedings as to render them fundamentally unfair. See Answer at 19 (citing Villafuerte v. Stewart, 111 F.3d 616, 627 (9th Cir. 1997); Jamal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); Ortiz-Sandoval v. Gomez, 81 F.3d 891, 897 (9th Cir. 1996)).

In Jamal v. Van de Kamp, the Ninth Circuit stated that on federal *habeas* review it may only consider whether the petitioner's conviction violated constitutional norms and that it may not review questions of state evidence law. See Jamal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991). Accordingly, because the petitioner claimed that he was denied his right to a fundamentally fair trial as guaranteed by the Due Process Clause, the Ninth Circuit looked to whether the state proceedings satisfied due process using the standard of whether the proceedings were so fatally infected as to render them fundamentally unfair. See id. at 920.

In Powell's case, the state trial court's ruling to prevent defense counsel's further questioning on redirect regarding evidence which the trial court had previously found to be irrelevant and, therefore, inadmissible, can properly be characterized as a state evidentiary ruling. However, similar to the petitioner in Van de Kamp, Powell has framed his claim as a violation of his due process right to a fair trial. Accordingly, this Court may consider whether Powell's trial satisfied due process by inquiring whether the proceedings in Powell's trial were so fatally infected as to render them fundamentally unfair.

In support of his contention that the trial court deprived him of his right to present a defense, Powell cites to Brown v. Israel, 449 F.Supp. 1029 (E.D. Wis. 1978). In Brown, the court granted the petitioner's writ of *habeas corpus* because the trial court deprived him of his right to present his heat of passion defense in his first degree murder trial. See id. at 1032. The court found that petitioner's testimony about his state of mind at the time of the offense was relevant to the pertinent state of mind issue, (*i.e.* whether he had the specific intent required for first degree murder), and that it was essential to the presentation of his heat of passion defense. See id. Accordingly, the court concluded that exclusion of petitioner's testimony violated his due process right to present a defense.

United States District Court
For the Northern District of California

The facts in Powell's case stand in contrast to those in Brown. Unlike the defendant in Brown, Powell was not precluded from presenting a defense. The trial court made a pre-trial ruling that evidence of Powell's motive or reasons for failing to appear (*i.e.* his fear of retaliation by the Black Guerilla Family once he was sent to prison) was not admissible to support a necessity defense nor to negate specific intent. See Answer at 8. Although defense counsel may have attempted to comply with the court's pre-trial ruling, nevertheless, on direct examination, Powell responded twice that the reason he failed to appear for his sentencing was his fear for his life once he arrived at San Quentin. These responses clearly violated the court's pre-trial ruling. Furthermore, when the trial judge interrupted direct examination to ask Powell questions, Powell again responded that he was afraid for his life. Notably, upon the court's second question to Powell, "...were you or were you not trying to avoid the court's sentence?," Pet. at 13, Powell responded, "[n]o I was not." Pet. at 14. The trial court allowed cross-examination on Powell's responses for the purpose of countering any sympathy that his responses might have engendered. See Pet. at 6. In keeping with its pre-trial ruling, however, the court denied defense counsel's request to redirect on the subject of Powell's fear of retaliation.

Powell was not precluded from presenting a defense because the necessity defense was not available to him. Furthermore, the trial court ruled that the testimony which Powell offered on direct was inadmissible because the necessity defense was not available to Powell and the testimony did not negate the element of specific intent. Powell does not challenge these rulings in his petition. The trial court found that Powell's reason for failing to appear was something for only the court to consider at sentencing. See Answer at 11. Although the court allowed the prosecution to cross-examine Powell regarding his fear of the BGF, the court did so only to counter any sympathy his impermissible testimony on direct may have created. Accordingly, Powell was not precluded from presenting his defense because the subject matter which defense counsel sought to cover on re-direct concerned evidence which the court had ruled inadmissible.

For the above stated reasons, the Court finds Powell's argument, that he was precluded from presenting a defense because he was prevented from responding to issues brought out on cross-

United States District Court
For the Northern District of California

examination related to the issue of specific intent, unpersuasive. The issues brought out on cross-examination relating to Powell's fear of retaliation by the BGF were the same issues impermissibly broached by Powell on direct examination. As previously stated, the trial court ruled that the evidence of Powell's fear of retaliation was irrelevant to a necessity defense because the defense was not available to Powell and the evidence was not relevant to the mental element of the offense. Furthermore, defense counsel was not precluded from asking Powell on redirect simply whether he intended to evade the court's process. Had Powell's defense counsel attempted to "correct the impression left after cross-examination regarding the issue of intent" (Pet. at 14) by asking this question, and had Powell answered "no," defense counsel could have left the last impression of Powell's intent and it simply would have been an issue of credibility for the jury to decide. Accordingly, the Court rejects Powell's claim that he was deprived of his right to make a defense. Moreover, *habeas* relief is denied on this claim because the trial court's exclusion of the testimony on re-direct was not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent.

C. The 25 years to Life Sentence for Third Strike Failure to Appear Conviction

Powell asserts that the 25 years to life sentence he received under California's Three Strikes law is grossly disproportionate to his failure to appear conviction and thereby violates the Eight Amendment's prohibition against cruel and unusual punishment.[9] The Court finds that the 25 years to life sentence for Powell's third strike failure to appear conviction is not grossly disproportionate to the crime committed. Accordingly, Powell's sentences does not violate the Eight Amendment, and therefore, is not contrary to and does not involve an unreasonable application of clearly established United States Supreme Court precedent.

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[9] The California Court of Appeals rejected Powell's contention that his sentence violates the Eight Amendment's prohibition against cruel and unusual punishment. Powell does not assert that California's Three Strikes law is unconstitutional on its face. The law is well settled that application of California's Three Strikes statute to third strike offenders does not, *per se*, constitute cruel and unusual punishment under the Eighth Amendment. See People v. Cooper, 43 Cal. App. 4th 815, 824 (1996); Harmelin v. Michigan, 501 U.S. 957, 1005 (1991).

United States District Court
For the Northern District of California

California's Three Strikes law, which appears in California Penal Code section 667 (b)-(l) provides for life imprisonment with a minimum term of at least twenty-five years for a conviction of any third felony after two or more prior convictions for what are deemed by statute to be "violent" (Cal. Penal Code § 667.5(c)) or "serious" (Cal. Penal Code § 1192.7(c)) felonies. The third felony need not be violent or serious. The Ninth Circuit has stated that recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. See People v. Cooper, 43 Cal. App. 4th 815, 824 (1996) (citing Rummel v. Estelle, 445 U.S. 263, 284 (1980)). The primary goals of recidivist statutes are: "... to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to segregate that person from the rest of society for an extended period of time." See Cooper at 824; Rummel at 284-285.

United States Supreme Court cases have established that the Eighth Amendment does not require strict proportionality between crime and sentence, but rather, prohibits imposition of extreme sentences that are grossly disproportionate to the severity of the crime.[10] See Harmelin v. Michigan, 501 U.S. at 1001 (Kennedy, J., concurring); Solem v. Helm, 463 U.S. 277, 288 (1983). Although Harmelin is a case without a majority opinion, the Ninth Circuit follows the "narrow proportionality" rule established by Justice Kennedy's concurrence. See United States v. Bland, 961 F.2d 123, 129 (9th Cir. 1992); United States v. Harris, 154 F.3d 1082, 1084 (9th Cir. 1998).

In Solem, the Supreme Court stated that a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed on other criminals in the same jurisdiction; and (3) the sentences imposed for commission of the same crime in other jurisdictions. See Solem at 292. However, in Harmelin, the Court found that intrajurisdicitonal and interjurisdictional analyses are "appropriate only in the rare case in which a threshold comparison of the crime committed and

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[10] The Court in Harmelin stated that due to the relative lack of objective standards concerning terms of imprisonment, successfully challenges to the proportionality of particular sentences are exceedingly rare outside the context of capital punishment. See Harmelin at 1001.

United States District Court
For the Northern District of California

the sentence imposed leads to an inference of gross disproportionality." See Harmelin at 1005. Accordingly, the proper role for comparative analysis of sentences in other jurisdictions is to validate an initial judgment that a sentence is grossly disproportionate to a crime. See id. Furthermore, although the Court in Solem stated that the principle focus must be on the principal felony that triggers the life sentence, a state is justified in punishing a recidivist more severely than it punishes a first offender, therefore, the offender's prior convictions are relevant to the sentencing decision. See Solem at 297-298.

(1) Gravity of the Offense and the Harshness of the Penalty

Powell asserts that the nature of his third strike, failure to appear, is not serious because it cannot be termed "one of the greatest problems affecting the health and welfare of our population," see Harmelin, 501 U.S. at 1002, nor is it a crime which involves harm to a person or property. These assertions may contain some truth, however, Powell improperly concludes that similar to a sentence for life imprisonment for overtime parking, his sentence of 25 years to life is grossly disproportionate for a failure to appear conviction. See Pet. at 15-16. As Respondent correctly points out, Powell did not receive a 25 years to life sentence for overtime parking, rather, he received this sentence for his failure to appear and for his recidivist behavior. See Answer at 27.

Powell cites to Solem v. Helm, 463 U.S. 277, 279 (1983), to support his contention that his sentence is grossly disproportionate to his third strike conviction for failure to appear. In Solem, the Supreme Court held that the defendant's sentence of life without the possibility of parole for a seventh nonviolent felony conviction was grossly disproportionate to the nature of the offense, thereby violating the Eight Amendment's proscription against cruel and unusual punishment. See Solem at 303. The defendant received the life sentence under South Dakota's recidivist statute after being convicted of uttering a "no account" check for $100 which the Court pointed out is viewed by society as among the less serious offenses. See id. at 278. Moreover, the defendant's six previous felony convictions were all nonviolent, none was a crime against a person, and alcohol was a

United States District Court
For the Northern District of California

contributing factor in each case.[11] See id. at 280. When considering the nature of the defendant's previous felony convictions, the Court recognized that a state is justified in punishing a recidivist more severely than it punishes a first offender, however, the defendant's status as a recidivist cannot be considered in the abstract. See id. at 297-298. The Court found that the sentence imposed on the defendant was the most severe that the state could have imposed on any criminal for any crime and that only capital punishment, a penalty not authorized in South Dakota, exceeds it. See id. at 297.

The facts in Powell's case are distinguishable. Powell asserts that similar to the defendant's offenses in Solem, failing to appear harms no person or property and must be viewed by society as a less serious offense. In addition, Powell asserts that all of his prior felony convictions involved unarmed offenses which are relatively minor. These characterizations are an understatement of the nature of Powell's prior felony convictions. Based on the record it is evident that Powell's prior felony convictions involved unarmed offenses. Nevertheless, two of those convictions were for crimes against a person: (1) the 1982 robbery conviction for purse snatching; and (2) the 1986 grand theft conviction for stealing a jewelry display from the victim. Moreover, Powell's failure to appear occurred after he was released on bail pending sentencing for possession of narcotics for sale. As the Court in Harmelin stated, "possession, use, and distribution of illegal drugs represent[s] 'one of the greatest problems affecting the health and welfare of our population.'" See Harmelin at 1002. In Harmelin the Court rejected the petitioner's contention that his crime of possession of cocaine was nonviolent and victimless, finding, to the contrary, that his crime caused grave harm to society. See id.

Further distinguishing Solem from Powell's case, the defendant's sentence in Solem was for life without the possibility of parole, the most severe sentence that could be imposed for any crime in that state. In contrast, Powell is eligible for parole after he serves the minimum term of his sentence, 25 years. See Pet. at 16. Although this same sentence may be imposed on defendants who have been convicted of arguably more serious crimes, it is not the most severe sentence that could be

[11] The defendant's prior felony convictions included: (1) third-degree burglary; (2) obtaining money under false pretenses; (3) grand larceny; and (4) third-offense driving while intoxicated. See Solem at 280.

United States District Court
For the Northern District of California

imposed for any crime in California.

The facts in Powell's case are more analogous to those in Estelle v. Rummel, 445 U.S. 263 (1980). In Rummel, the Court found that the mandatory life sentence with the possibility of parole after 12 years imposed on the defendant under Texas' recidivist statute did not constitute cruel and unusual punishment. See id. at 285. The sentence was based on the defendant's third felony conviction for obtaining $120.75 by false pretenses and his prior felony convictions for: (1) fraudulent use of a credit card to obtain $80 worth of goods or services; and (2) passing a forged check in the amount of $28.36. See id. at 265. The Court rejected the defendant's attempts to characterize his offenses as "petty" by pointing to the absence of violence in his crimes, finding that the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or in punishing a particular criminal. See id. at 275. Moreover, the Court recognized the state's interests, expressed in all recidivist statutes, in dealing in a harsher manner with those who have shown by repeated criminal acts that they are simply incapable of conforming to the norms of society as established by its criminal law. See id. at 276. Accordingly, the Rummel Court concluded that after having twice imprisoned the defendant for felonies, the state was entitled to place upon the defendant the onus of one who is simply unable to bring his conduct within the social norms prescribed by the criminal law of the state. See id. at 284.

The rationale expressed by the Court in Rummel applies with equal force to Powell's case. Although Powell's third strike and prior felony convictions are not crimes of violence, they are far more serious than the defendant's third strike and prior felony convictions in Rummel. Similarly, Powell has proved through his extensive criminal history that he is incapable or unable to bring his conduct within the social norms prescribed by the criminal law of the state. Based on the record in Powell's case, this Court does not find an inference that his 25 years to life sentence is grossly disproportionate to the third strike felony conviction for failure to appear. Accordingly, the Court rejects Powell's claim that his sentence violates the Eight Amendment and denies *habeas* relief on this claim because the sentence is not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent.

United States District Court
For the Northern District of California

Although the Court has determined that Powell's sentence is not grossly disproportionate to the crime for which he was sentenced, and therefore, does not violate the Eight Amendment, the Court will briefly address Powell's intrajurisdictional and interjurisdictional analyses.

(2) Intrajurisdictional Analysis - Comparative Punishment Within California

Powell contends that he is the only person in California who has been sentenced to 25 years to life on "such a minimal and nongrievous criminal history." See Traverse at 15. As discussed above, Powell's criminal history cannot properly be characterized as minimal and nongrievous. Moreover, Powell incorrectly asserts that not one of the other seven inmates in the California Department of Corrections, who have been sentenced to a term of 25 years to life based in part on a third strike failure to appear conviction, has a criminal record similar to his. See Pet. Appendix B. For example, Munoz Esteban, #K35097, who was sentenced on a third strike failure to appear, has three underlying felony burglary convictions. See id. This criminal history is substantially similar to Powell's. In addition, four of the other inmates also have burglary and robbery convictions in their criminal history. Although these four inmates' records reflect crimes of a more violent nature, the Supreme Court in Rummel stated that the "absence of presence of violence does not always reflect the strength of society's interest in deterring a particular crime or punishing a particular individual." See Rummel at 275.

Powell cites People v. Dillon for the proposition that a first degree murderer can receive less time than he received. See People v. Dillon, 34 Cal. 3d 441, 487 (1983). The California Supreme Court found the 17-year old defendant's sentence for life with eligibility for parole after 16 years for first degree murder to be cruel and unusual punishment, taking into account the defendant's youth and immaturity. See id. at 487. This case is inapposite because the defendant was a first time offender and was not sentenced under the recidivist statute like Powell.

Powell also cites People v. Andrews for the proposition that an offender sentenced in one California county rather than another can also receive less time than he received. See People v. Andrews, 65 Cal. App. 4th 1098, 1100 (1998). This case is also inapposite to the facts in Powell's case. Although the defendant in Andrews was sentenced under California's Three Strikes law, he

United States District Court
For the Northern District of California

raised an equal protection challenge on the ground that his case would not have been prosecuted as a third strike case in another county. See id. at 1101. In contrast, Powell has raised an Eight Amendment claim, not an equal protection claim.

In addition to Powell's failure to show facts which raise an inference that his sentence is grossly disproportionate to the crime committed, a comparison of Powell's sentence with the sentences received by other offenders in California who have committed more serious or similar crimes does not compel the conclusion that his sentence violates the Eight Amendment's prohibition against cruel and unusual punishment. Accordingly, the comparison to other California punishments provides an alternative basis for the Court to find that Powell's sentence is not contrary to nor an unreasonable application of clearly established Supreme Court precedent, and thereby to deny *habeas* relief.

(3) Interjurisdictional Analysis of Comparative Punishments Within the United States

Powell further asserts that California's Three Strikes law is the most punitive in the United States and that in no other jurisdiction would the minimum mandatory sentence for a third felony which is neither serious or violent be 25 years to life. This claim also lacks merit. In rejecting Powell's Eight Amendment claim, the California Court of Appeal found that a comparison of California's Three Strikes law to the recidivist statutes of other states "does not compel the conclusion that it prescribes a penalty disproportionate to that imposed in other jurisdictions." See Answer at 27. That court found that although some states prescribe less severe penalties than those in California, a number of jurisdictions prescribe penalties similar to California's.[12] See id.

Similarly, in Rummel, the United States Supreme Court found that although the defendant might have received a more lenient sentence in almost any other state than Texas, the distinctions were "subtle rather than gross." See Rummel at 279. The Court further noted that even if it were to

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[12] The California Court of Appeal noted that: (1) in Mississippi, a third felony conviction when any one of the three felonies is a crime of violence, subjects the offender to a term of life imprisonment without the possibility of parole or probation; (2) in Nevada, a fourth felony conviction subjects the defendant to a term of life with or without the possibility of parole; and (3) in Texas, a third felony conviction subjects the defendant to a term of life or a term set between 25 and 99 years. See Answer at 27.

United States District Court
For the Northern District of California

assume that Texas' recidivist statute was the most stringent found in the United States, that severity would hardly render the defendant's punishment grossly disproportionate to his offenses or to the punishment he would have received in other states. See id. at 282. Importantly, the Rummel Court emphasized that some state will always bear the distinction of treating particular offenders more severely than any other state in the absence of a constitutionally imposed uniformity, yet such uniformity would be adverse to traditional notions of federalism. See id.

In light of the Court's reasoning in Rummel, and Powell's failure to show, given his recidivist history, that his sentence is grossly disproportionate to his third strike failure to appear conviction, the Court cannot say as a matter of law that California's Three Strikes statute is disproportionately harsher than comparable recidivist statutes in other states. Accordingly, this Court reaffirms its denial of *habeas* relief on the grounds that Powell's sentence does not violate the Eighth Amendment, and therefore, is not contrary to nor an unreasonable application of clearly established Supreme Court precedent.

IV. ORDER

Based on the foregoing, this Court denies Powell's petition for a writ of *habeas corpus* on the following grounds: (1) the trial court's mid-trial comments to the jury do not constitute error, and therefore, were not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent; (2) the trial court's exclusion of evidence on redirect did not violate Powell's right to make a defense, and therefore, was not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent; (3)Powell's sentence does not violate

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United States District Court
For the Northern District of California

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the Eight Amendment's prohibition against cruel and unusual punishment, and therefore, is not contrary to nor an unreasonable application of clearly established United States Supreme Court precedent.[13]

IT IS SO ORDERED.

Dated: 12/12/2022

MARTIN J. JENKINS
UNITED STATES DISTRICT JUDGE

[13] The Court acknowledges Petitioner's request for an evidentiary hearing to resolve any factual disputes between the parties and finds that such a hearing remains unnecessary.

United States District Court
For the Northern District of California